Supreme Court of the United States

OCTOBER TERM, 1960

No.

UNITED STATES OF AMERICA ex rel.
JUAN PEREZ VARELA

v.

ESPERDY, District Director of Immigration and Naturalization

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statutes Involved	2
Statement of Case and Disposition Below	3
Reasons for Granting the Writ	4
Conclusion	13
APPENDIX A:	
Treaty of 1902, Article XXIV	1a
Seamans Act of 1915, Sections 16 and 17	2a
Excerpts from Immigration and Nationality Act of 1952	4a
APPENDIX B:	
Opinion of Court of Appeals	8a
Opinion Denying Writ, Bicks, *J.*	13a
APPENDIX C:	
Affidavit of Juan Parez Varala	17a
APPENDIX D:	
Order on Judgment	18a

Cases Cited

Edye v. Robertsen (Head Money Cases), 1884, 112 U. S. 580	6
Fong Yue Ting v. United States, 1893, 149 U. S. 698	6, 12
Grin v. Shine, 187 U. S. at 184	13
In re Castioni, 1890 (189), 1 Q. B. 149, 7 T. L. R. 50	6

PAGE

In re Ezeta (U. S. D. C., N. D. Calif., 1894), 62 Fed. 972 6

Kandzole v. Artukovic (9th Circ., 1954), 247 F. 2d 198 6

Kwong Hai Chew v. Colding, 1953, 344 U. S. 590 .. 5

Mitchell v. United States, 1834, 34 U. S. (9 Pet.) 711 11

Ramos v. Diaz (U. S. D. C., S. D. Fla., 159), 179 F. Supp. 459 6

Regina v. Governor of Brixton Prison; Ex Parte Kolezynski (1955), 1 Q. B. 540 (1955), 2 W. L. R. 116 (1955), 1 A. E. R. 31 6

Tucker v. Alexandroff, 1902, 183 U. S. 424 11

United States v. Clarke, 1835, 33 U. S. (8 Pet.) 436 .. 11

United States v. Witkowitch, 1956, 353 U. S. 194 12

Wong Yang Sung v. McGrath, 1950, 339 U. S. 33 4

Yamataya v. Fisher, 1903, 189 U. S. 86 5

Other Authorities Cited

Immigration and Naturalization Act (66 Stat. 163): Sections 101(a)(15)(D) (8 U. S. C. Section 1101(a)(15)(D); 242(b) 8 U. S. C. 1252(b); Section 243(h) (8 U. S. C. Sec. 1253(b); Section 292 (8 U. S. C. Sec. 1362) 3, 9, 10

Pierce's Federal Code, 1910, Section 4019 3

Sections 16 and 17 of the Seaman's Act of 1915, Chapter 153 of the Laws of 1915, 38 Stat. 1184 .. 3

Section 5280 of the Revised Statutes 3

28 U. S. C. Section 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

UNITED STATES OF AMERICA, *ex rel.* JUAN PEREZ-VARELA,
Petitioner,

against

P. A. ESPERDY, District Director of the New York District of the Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Juan Perez-Varela, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, filed in the above entitled case on January 19, 1961 and printed in Appendix D, *infra,* page 18a.

Opinions Below

The Memorandum Opinion of the District Court is printed in Appendix B hereto, *infra,* pages 13a to 15a, and is reported at 187 F. Supp. 378. The Opinion of the Court of Appeals, printed in Appendix B hereto, *infra,* pages 8a to 12a, is reported at 285 F. 2d 723.

The Court of Appeals denied a Petition for Rehearing without opinion.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on January 19, 1961.

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that a Spanish naval seaman who had deserted from his vessel in a port of the United States and had remained here after his vessel had left port could, without notice or hearing, be turned over to the Spanish government for involuntary return to Spain.

2. Whether an alien who has entered this country as a deserting naval seaman, can be involuntariiy extradited to a foreign country if it is or can be shown that his extradition is sought for the purpose of punishing him for a political offense.

3. Whether the Immigration and Naturalization Service has the power to arrest a resident alien and surrender him to a foreign government without complying with the statutory procedure for either prescribed deportation or extradition.

Constitutional Provision and Statutes Involved

1. The Constitutional provision involved is the Fifth Amendment to the Constitution of the United States, which provides, in relevant part: "No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

2. Article XXIV, Treaty of Friendship and General Relations between the United States and Spain, signed July 3, 1902, 33 Stat. 2105, 2117.

3. Sections 16 and 17 of the Seaman's Act of 1915, Chapter 153 of the Laws of 1915, 38 stat. 1184.

4. Section 5280 of the Revised Statutes (Pierce's Federal Code, 1910, Section 4019).

5. Section 3184 of Title 18, U. S. C. (previously Section 5270 of the Revised Statutes).

6. Immigration & Naturalization Act (66 Stat. 163) Sections 101(a)(15)(D) (8 U. S. C. Section 1101(a)(15)(D)); 242(b) 8 U. S. C. 1252(b); Section 243(h) (8 U. S. C. Sec. 1253(b)); Section 292 (8 U. S. C. Sec. 1362).

All of the Statutes numbered "2" through "6" above are printed in Appendix A, *infra*, pages 1a to 7a.

Statement of Case and Disposition Below

Juan Perez-Varela is a 22 year old native and citizen of Spain who was conscripted into the Spanish navy over four years ago. He was assigned to a training vessel, the Juan Sebastian de Elcano, as a member of the crew, and met his present wife, an American citizen, in Puerto Rico, and married her approximately one year thereafter while in the United States.

He had evidenced his disagreement with the totalitarian regime of the Franco government. When the training ship arrived in New York City in April of 1960 he was accorded shore leave with the consent of the Immigration and Naturalization Service, but because of this political difference with the Franco regime, he failed to return to the ship prior to its departure in May of 1960.

On May 10, 1960, the Consul General of Spain advised the Immigration and Naturalization Service of the desertion of Perez-Varela from the vessel. Thereafter, on July 11, 1960, Perez-Varela appeared before an officer of the Immigration and Naturalization Service who sought to

obtain a statement from him. Petitioner gave his name but refused to make a voluntary statement without counsel and refused to sign the paper. This is so set forth in the so-called "affidavit". The affidavit is printed *infra*, Appendix C at page 17a.

On July 18, 1960, through the intervention of the Confederated Spanish Societies, the Republic of Mexico granted Perez-Varela political asylum by issuing a visa to him. However, the Immigration and Naturalization Service refused to permit him to go to Mexico without the consent of the Spanish Government which consent was not given. Since then the Spanish government has threatened petitioner with a life jail sentence on his return because of the publicity aroused by this case.

Arrangements were then made by the Immigration and Naturalization Service to turn the Petitioner over to the Spanish Consul for return to Spain on October 6, 1960. A Writ of Habeas Corpus had been allowed by the United States District Court in the Southern District of New York on July 14, 1960 and the Writ itself was denied on October 4, 1960. The United States Court of Appeals affirmed on December 22, 1960 and denied rehearing on January 18, 1961.

Reasons for Granting the Writ

The Court below decided that petitioner, on the basis of mere identification as a wanted deserter, could by virtue of the Treaty of July 3, 1902, be seized and returned to Spain without notice or hearing. That decision is in conflict with the decision of this Court in *Wong Yang Sung* v. *McGrath*, 1950, 339 U. S. 33, on a fundamental question of constitutional law.

In *Wong Yang Sung*, this Court held that an alien seaman who had overstayed his shore leave could not constitutionally be expelled from this country without first being

accorded a fair hearing. In so holding, this Court adhered to a principle which it has consistently followed, to the effect that an alien who has entered this country, even though illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. *Cf. The Japanese Immigrant Case (Yamataya* v. *Fisher)*, 1903, 189 U. S. 86, 100-101; *Kwong Hai Chew* v. *Colding*, 1953, 344 U. S. 590.

The Constitutional guarantee of due process is implemented by statute to cover instances in which expulsion is demanded in terms of either deportation or extradition.

Due process in deportation is embodied in Section 242(a) of Immigration and Nationality Act and in extradition, in Section 3184, Title 18 of the U. S. Code and Section 5280 of the Revised Statutes.

Wong Yang Sung's case involved deportation. But regardless of whether petitioner here is faced with extradition or deportation, the constitutional question here is the same as it was there. Petitioner, like Wong Yang Sung, is a person who has entered the United States as an alien seaman and having entered, gained the protection of the Fifth Amendment to the United States Constitution. His rights under the Fifth Amendment were not affected by the Treaty of 1902. Accordingly, he cannot be expelled from this country, either by deportation or by extradition, without due process of law.

2. Assuming that the proceedings in the case at bar were in the nature of extradition, then the decisions of the Court below, by denying petitioner the right to a hearing prior to extradition, prevented consideration of—and decided *sub silentio*—an important question of international law which should be, but has not yet been decided by this Court.

Our courts have consistently held that a person cannot be extradited from the United States to a foreign country

if he is sought by that country for a political offense. On this question they have followed the decision of the Queen's Bench Division in *In re Castioni*, 1890, [1891] 1 Q. B. 149, 7 T. L. R. 50; *cf. In re Ezeta* (U. S. D. C., N. D. Calif., 1894), 62 Fed. 972, 997-999 and *Kandzole* v. *Artukovic* (9th Circ., 1954), 247 F. 2d 198, 202-203; *Ramos* v. *Diaz*, (U. S. D. C., S. D. Fla., 159) 179 F. Supp. 459. The court which decided *In re Castioni* has recently held in a case similar to the instant one that a refugee who has escaped from his country for political reasons and who would be subject to political persecution if returned there must be regarded as a political offender and deemed non-extraditable, *Regina* v. *Governor of Brixton Prison; Ex Parte Kolczynski*, 1954, [1955] 1 Q. B. 540, [1955] 2 W. L. R. 116, [1955] 1 A. E. R. 31.

In deciding *Ex Parte Kolczynski*, the Queens Bench Division drew attention to the political changes which have occurred in the past half century and emphasized the need to protect political refugees who would face persecution if returned to the countries from which they fled. Cassels, J., emphasized the importance of this question for modern international law as follows ([1955] 1 Q. B. at 549):

> "The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when *Castioni's* case was considered. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case the members of the crew of a small trawler engaged in fishing were under political supervision and they revolted by the only means open to them. They committed an offence of a political character and if they were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime."

The decisions of the Courts below in the instant case foreclose this petitioner or for any other person whose extradition is sought by the Spanish government under the Treaty of July 3, 1902 or by the Greek government under the essentially similar treaty of November 19, 1902 (December 2, 1902), Article XIII, 33 Stat. 2122, 2131, from demonstrating that his extradition is sought for a political offense and to raise the question of non-extraditability of political offenders.

In view of the large numbers of political refugees who have been welcomed to our shores and the much larger numbers who are yet abroad in the world, the question which the Court below precluded from consideration is of great importance to federal law and to our Government's posture in foreign relations.

3. The Court below decided that the Immigration and Naturalization Service has the power to bypass the statutory procedures for deportation and extradition and, without statutory authorization of any kind, summarily arrest an alien and turn him over to a foreign government. This arbitrary procedure deprives the alien of statutory as well as constitutional rights of due process.

The statutes which establish the proper procedures will be considered here under the broad delineation between those applicable to deportation and those applicable to extradition. The distinction between these two categories was discussed in *Fong Yue Ting* v. *United States*, 1893, 149 U. S. 698, 709, where this Court said:

> "Extradition is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished. Deportation is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken."

It is submitted that if the "surrender" of petitioner to the Spanish authorities is to be made because they have demanded it, then this is a case of extradition. If the "surrender" is to be made merely because the Immigration and Naturalization Service wishes to do so in response to a request, then this is a case of deportation. In either event, the surrender can be carried out only in accordance with the applicable statutory procedure.

(a) It is submitted that an alien, after entry, can be deported only in accordance with the statutory procedure established by the Immigration and Nationality Act, and to the extent that the Treaty may seemingly require the seizure of an alien without according him constitutional safeguards or procedural due process, such Treaty must give way to the provisions of a subsequently enacted statute embodying constitutional procedural due process protective provisions. The Immigration and Nationality Act of 1952 prescribes in detail the procedure for deportation and the method of selecting the destination of one ordered deportable, and to the extent that the same conflicts with the Treaty, the Treaty must give way. *Edye* v. *Robertsen* (*Head Money Cases*), 1884, 112 U.S. 580.

The intent of Congress as to the scope of the Act, is further evidenced by the specific provisions of Section 403(b) of the Immigration and Nationality Act, which reads as follows:

> "Except as otherwise provided in Section 405, all other laws, or portions of laws, in conflict or inconsistent with this Act, are, to the extent of such conflict or inconsistency, repealed."

Obviously, the Treaty provisions as interpreted by the respondent, namely as permitting deportation proceedings to be conducted without regard to due process as provided in Section 242, or as permitting the summary turning over of the petitioner to the Spanish authorities for ultimate

destination of Spain, is also contrary and inconsistent with Section 243 of the Act, which at the outset states that the deportation shall be directed to a country promptly designated by the alien if that country is willing to accept him into its territory etc., or the various other destinations selected without priority, and which even permits the withholding of deportation itself in accordance with Section 243(h) on the showing of physical persecution.

Furthermore, the Immigration & Nationality Act classifies naval seamen as crewmen under Subparagraph (D) of Section 101(a)(15).

Frank L. Auerbach, Assistant to the Director of the Visa Office of the Department of State, in his authoritative book, Immigration Laws of the United States, 2nd Edition, 1961, devotes Chapter 28 to "crewman", and in Section 2 thereof he refers to alien crewmen on foreign warships. The clear implication to be drawn from the same is that alien crewman on foreign warships are nonimmigrant crewman within the definition of Section 101(a)(15)(D).

The fact that there is no other law that refers to crewman on foreign warships reinforces Mr. Auerbach's views and observations that alien crewmen on board foreign warships come within the definition of alien crewman, as defined in Section 101(a)(15)(D).

The Court below based its opinion for affirmance on the reasoning that Congress in enacting the Seamen's Act of 1915, *supra*, limited the same to deserting merchant seamen because it recognized that the same urgency did not exist with respect to deserting merchant seamen as it did with respect to deserting naval seamen, in that the complement of personnel aboard war ships had to be maintained, whereas this consideration is not of such moment as to mechant vessels.

This reasoning, however, is not supported in fact or law. At the time Perez-Varela was apprehended, the training ship had long since departed our shores.

Then, as now, deserting crewmen who are apprehended when their vessels are still in port, irrespective as to whether such vessels are merchant or naval in character, can be summarily returned to the vessels without notice and hearing. However, the apprehension of deserting seamen after their vessels have departed, requires the deportation of such seaman in accordance with the pertinent provisions of the Immigration and Nationality Act, 66 Stat. 163.

The thrust of that Court's reasoning further diminishes when we note that the United States does not have similar treaties in force with most nations and that a deserting naval seaman from a vessel of those countries who is apprehended after his naval vessel has departed, as in the case at bar, can only be deported in accordance with the procedure set forth in the Immigration and Nationality Act. It would therefore appear incongruous to believe that Congress did intend, when it enacted the Immigration and Nationality Act, to accord due process to deserting seamen of naval vessels from almost all countries and deny such procedural and substantive due process to those from Spain and Greece; the two nations with whom the United States still has treaties relating to deserting naval seamen.

Under the same set of facts, the Government must concede, Perez-Varela, as a deserting Russian, German, Russian, Englishman, Cuban, etc., could only be expelled from the United States pursuant to pertinent provisions of the Immigration and Nationality Act, and would have been entitled to due process as detailed in that act. In the application of Section 243(h), he could have avoided his deportation to his native country by showing that the same would subject him to physical persecution. It is evident that the act was designed to govern the deportation of naval crewmen as well as merchant seamen. Since the act, by its terms, varies considerably from Article XXIV of the

Treaty, and since it postdates the Treaty, the Treaty must give way.

(b) It is further submitted that the respondent and the Spanish government did not follow the procedures for the arrest and surrender of deserters set forth in the Treaty of July 3, 1902 and implementing statutes.

The treaty provides that the demanding consul shall apply in writing to the "competent national and local authorities" of the country for arrest and surrender of the deserter. The phrase "competent authorities" means officers authorized by law to perform the functions requested; see *Mitchell* v. *United States*, 1834, 34 U. S. (9 Pet.) 711, 735; *United States* v. *Clarke*, 1835, 33 U. S. (8 Pet.) 436, 449. It is similar in meaning to the phrase, "competent tribunals, judges and officers" used in the essentially similar treaty with Russia of December 1832; see *Tucker* v. *Alexandroff*, 1902, 183 U. S. 424, 429.

Clearly, therefore, the treaty requires the Spanish consul to apply to the officer authorized by Congress to bring about the arrest and surrender of a naval deserter. As will be shown below, that officer is the judge or commissioner of a United States District Court or the judge of a state court of general jurisdiction. The Spanish consul has not submitted to proper application and evidence to such officer.

(i) The principal implementing statute involved is Section 5280 of the Revised Statutes, which was enacted to apply specifically to deserting seamen whose surrender is demanded pursuant to treaty. Respondent has argued below that R. S. 5280 was repealed by Section 17 of the Seaman's Act of 1915, 38 Stat. 1184. However, Section 17 is capable of two readings: namely, (1) that Section 5280 is repealed in its entirety and (2) that only so much of Section 5280 as relates to merchant seamen is repealed. The latter is the proper interpretation. Section 17 should

be read in light of and together with the preceding Section 16, which expresses the intent of Congress to protect merchant seamen from extradition for desertion and to leave the situation regarding naval seamen unchanged. To hold R. S. 5280 repealed as to naval seamen as well as to merchant seamen would be to bow to the tyranny of literalism which this Court has, on other occasions rejected (*cf. United States* v. *Witkowitch*, 1956, 353 U. S. 194, 199) and to ignore Congress's obvious intent, in passing the Seamen's Act, that that Act apply only to merchant seamen.

(ii) However, if R. S. 5280 be deemed to have been repealed, this case must fall within the ambit of 18 U. S. C. § 3184, which statute provides procedure for a fair hearing in suits by foreign governments for extradition of fugitives. The scope of the statute is indicated in its opening words where it states that the procedure therein provided is to be applicable "Whenever there is a treaty or convention for extradition between the United States and any foreign government. * * *"

Clearly, the "surrender" demanded by the Spanish government in this case is extradition, as that word is defined in *Fong Yue Ting* v. *United States, supra*, 149 U. S. at 709 (quoted *supra*). Equally clearly, Section 3184 (formerly R. S. 5270) applies to all foreign governments with whom we have treaties of extradition; see *Grin* v. *Shine*, 1902, 187 U. S. 181, 191. Accordingly, in the absence of a more specific statute (such as R. S. 5280), Section 3184 controls.

Under either statute—R. S. 5280 or 18 U. S. C. Section 3184—the authorities rendered competent to bring about the arrest and surrender of naval deserters are United States District Courts or state courts of general jurisdiction, and their authority so to do is subject to requirements of notice and hearing. The attempt of the Immigration Service to bypass this statutory procedure and arbitrarily seize and kidnap the petitioner is therefor illegal and in violation of the treaty and of the statutes implementing

the treaty. For reasons mentioned earlier, it is also in violation of the Fifth Amendment to the Constitution.

The good faith to be accorded foreign nations pursuant to treaties of extradition was discussed in *Grin* v. *Shine*, *supra*, 187 U. S. at 184, where this Court said:

> "Good faith toward foreign powers, with which we have entered into treaties of extradition, does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defences as others accused of crime within our own jurisdiction. * * * These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused."

The Petitioner has been denied his rights to procedural due process both under the Constitution and pursuant to statute so providing. Thus, he has also been foreclosed from showing that his return to Spain would subject him to physical persecution for an offense which is political in nature and from seeking the relief to which he would thereby be entitled. He, therefore, has been denied substantive due process as well.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 30, 1961.

APPENDIX A

Treaty of 1902, Article XXIV

33 STAT 2117

"Treaty between United States and Spain of Friendship and General Relations. Signed at Madrid July 3, 1902; ratification advised by the Senate, December 16, 1902; ratified by President, February 6, 1903; ratified by Spain, March 30, 1903.' Ratifications exchanged at Madrid April 14, 1903; proclaimed, April 20, 1903".

ARTICLE XXIV

"The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two countries may respectively cause to be arrested and sent on board or cause to be returned to their own country, such officers, seamen or other persons forming part of the crew of ships of war or merchant vessels of their notion, who may have deserted in one of the ports of the other.

To this end they shall respectively address the competent national or local authorities in writing, and make request for the return of the deserter and furnish evidence by exhibiting the register, crew list or other official document of the vessel, or a copy or extract therefrom, duly certified, that the persons claimed belong to said ship's company. On such application being made, all assistance shall be furnished for the pursuit and arrest of such deserter, who shall even be detained and guarded in the *gaols* of the country pursuant to the requisition and at the expense of the Consuls-General, Consuls, Vice-Consuls or Consular Agents, until they find an opportunity to send the deserters home.

If, however, no such opportunity shall be had for the space of three months from the day of the arrest, the deserters shall be set at liberty, and shall not again be ar-

rested for the same cause. It is understood that persons who are citizens or subjects of the country within which he is found, he shall not be placed at the disposal of the Consul until after the proper Tribunal having jurisdiction in the case shall have pronounced sentence, and such sentence shall have been executed."

Seamans Act of 1915, Sections 16 and 17

Sec. 16. That in the judgment of Congress articles in treaties and conventions of the United States, in so far as they provide for the arrest and imprisonment of officers and seamen deserting or charged with desertion *from merchant vessels* of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment and any other treaty provision in conflict with the provisions of this Act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within ninety days after the passage of this Act, to give notice to the several Governments, respectively, that so much as hereinbefore described of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions. Emphasis added.

Sec. 17. That upon the expiration after notice of the periods required, respectively, by said treaties and conventions and of one year in the case of the independent State of the Kongo, so much as hereinbefore described in each and every one of said articles shall be deemed and held to have expired and to be of no force and effect, and there-

upon section fifty-two hundred and eighty and so much of section four thousand and eighty-one of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion *from merchant vessels* of foreign nations in the United States and Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, shall be, and is hereby, repealed. Emphasis added.

SECTION 5280 OF THE REVISED STATUTES

"Sec. 5280. On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any circuit court, justice or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. * * *" The procedure is then set forth.

18 U. S. C. SEC. 3184

Sec. 3184. Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having commifted within the jurisdiction of any such

foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Excerpts from Immigration and Nationality Act of 1952

SECTION 101(a)(15)(D)

(D) An alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

SECTION 242(b)

Proceedings.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evi-

dence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an lien is ordered from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under Section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially

unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

SECTION 243(h)

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

SEC. 292. In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

APPENDIX B

Opinion of Court of Appeals

285 F. 2d 723

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

Before LUMBARD, Chief Judge, HAND and WATERMAN, Circuit Judges.

HAND, *Circuit Judge*—This is an appeal from an order dismissing a petition for habeas corpus for the release of the relator from the custody of the New York District Director of Immigration and Naturalization. The petitioner is a sailor, serving as a cook on board a "training ship" of the Spanish Navy. He arrived in Miami last March and was allowed with the other members of the crew the usual sightseeing visits ashore. He returned each night and sailed with his ship to New York, where he arrived in April, 1960. At that port he went ashore some time in May but did not return before the ship left that month and thus became a "deserter." On May 10 the Consul General of Spain advised the Immigration and Naturalization Service of these facts and the "Service" started to search for him. He was finally arrested on the 8th of July, at which time he told the officers of the "Service" that, even when he "signed on," he had meant to desert when the ship arrived in the United States. The officials who arrested him seized some documents, which were not, however, used in determining his arrest or detention. On July 11 he appeared before an officer of the "Service" who told him that he might say anything that he chose, but that it would be used against him. The relator then gave his name, but refused any further information. On July 14 the Spanish Consul General

advised the "Service" that he was trying to make arrangements for the relator to leave on a Spanish ship, but that a pending writ of habeas corpus prevented him from proceeding. Such a writ was pending before Judge Bicks who dismissed the petition from which this appeal was taken.

The relator's position is that at the time of the arrest he was not subject to Article XXIV of the treaty of 1903 between the United States and Spain which provided that "Consular Agents of the two countries may respectively cause to be arrested and sent on board or caused to be returned to their own country, such officers, seamen or other persons forming part of the crew of ships of war or merchant vessels of their Nation who have deserted." The "Agents" are to write to "national or local authorities," requesting "the return of the deserter and furnish evidence by exhibiting the register, crew list * * * or a copy * * * duly certified, that the persons claimed belonged to said ship's company." Thereupon "all assistance shall be furnished for the pursuit and arrest of such deserters, who shall even be detained and guarded in the gaols of the country * * * until they" (the "Agents") "find an opportunity to send the deserters home."

1915 Congress passed chapter 153 of the Laws of 1915, whose caption provided that it was "to promote the welfare of American seamen in the merchant marine * * * to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto." Section 16 of this statute (38 Stat. 1184) declared that Congress wished to "terminate" the treaties and conventions of the United States that provided "for the arrest and imprisonment of officers and seamen," who deserted from "merchant vessels of foreign nations in the United States," and that such provisions ought to be terminated as "in conflict with the provisions" of the act then passed which in many respect ameliorated the position of seamen including deserters. This statute

expressly left untouched the procedure in existing treaties so far as they applied to the "crews of ships of war," and the case at Bar depends upon whether any act passed after 1915 has repealed what was so left of the treaty with Spain. The relator argues that although the acts of 1917, 1924 and 1952, concerned the naturalization as well as the deportation of aliens, in general terms they all covered deserters from "ships of war," and therefore repealed what was left of the treaty of 1903. For example, the Act of 1917 (chap. 29 Sec. 1), declared that "the term, 'seaman' as used in this Act shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place." The Act of 1924 does not contain anything pertinent to the treaty provisions; but the Immigration and Naturalization Act of 1952, section 1101(a)(10) repeats in substance the language of the Act of 1917: i. e., the term "crewman" shall include a person serving "in any capacity on board a vessel or aircraft."

It appears to us that we should not interpret this language we have just quoted from the Acts of 1917 and 1952 as intended to repeal that part of the treaty that Congress had left untouched two years earlier by the Act of 1915. It is true that section 1 of chapter 29 if read in entire disregard of the purposes of that chapter covers the case of a deserter from a foreign ship of war; and section 34 of the act provides that "any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be * * * taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission * * * and, if not admitted, * * * shall be deported * * * " (39 Stat. 896). We can find nothing in the Act of 1917 that makes section 34 applicable to sailors on foreign ships of war, particularly in the light of Congress's explicit exclusion of crews of ships of war in the Act of 1915.

Appendix B

There is no reason, a priori, for assuming an intent to repeal the treaty from the words used in section 1 of the Act of 1917 covering deserters from merchant vessels. It had been our custom for over a century in treaties with other states to treat deserters summarily, and as subject to arrest and return upon the request of consuls and upon evidence only that they were members of the crews. A list of over forty such treaties appears in Tucker v. Alexandroff (183 U. S. 424, 461, 462). Moreover, there was an obvious valid reason for the distinction in the Act of 1915 between merchant vessels and ships of war. The treaties were all reciprocal: that is, they granted to ships of the United States the same immunity which they accorded to the other contracting state, in each case insuring an adequate crew to work the ship back to her home port without the delay of a judicial hearing. Patently by 1915 it had been decided that the interest of merchant ships in such drastic control of their crews was no longer desirable, and it is conceivable that this change of attitude might have included ships of war.

However, the two situations are of altogether different gravity. To tie up a merchant vessel during the pendency of a hearing would seldom impose any serious injury on the national interests of the state to which she belonged; but to tie up a ship of war might imperil the defense of that state, especially if the deserter or deserters, were necessary to her operation. This seems certainly to have been the reason for section 16 of the Act of 1915; and, as we have said there is nothing in the record to suggest that the contracting states had mutually meant to expose themselves to such dangers.

The situation of a seaman on a ship of war in a foreign port is analogous to that of a soldier in troops that have been given leave to pass through the territory of another friendly state. He remains subject to the same controls that apply while the regiment is in its own territory. The

language of Chief Justice Marshall in The Exchange (7 Cranch 116, 143) though spoken of a ship of war itself, is in point: "She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign: is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality." Although, this language was used of a ship of war itself, we cannot see, as we have just said, why it is not equally applicable to the crew without which she is useless for defense.

Finally, it is plain that a ship used to train seamen to serve on ships of war should be equally immune from local jurisdiction. It would obviously be an absurd distinction to protect only that part of the military establishment of another state which is already qualified, but to deny protection to those who are in process of preparation.

Order affirmed.

Appendix B

Opinion Denying Writ, Bicks, *J.*

187 F. Supp. 378

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

Bicks, *District Judge*:

On July 8, 1960, acting upon information communicated by the Consul General of Spain that one Juan de la Cruz Perez-Varela deserted a Spanish naval training vessel while it was in the Port of New York between April 26 and May 3, 1960, the Immigration authorities apprehended and interrogated the petitioner. The facts which preceded this action, briefly, are as follows: Relator, a native and citizen of Spain, was a member of the crew of a training vessel of the Spanish navy; while his vessel was in the Port of New York, and in accord with international comity, petitioner was privileged to leave the vessel to visit within the area of the port; during said shore leave, petitioner apparently deserted, and, the day before his apprehension, apparently entered into a marriage with a citizen of this country.

In the course of being interrogated on the day of his apprehension, petitioner, after identifying himself, stated to the two investigators of the Immigration and Naturalization Service that before his vessel left Spain he formed an intention to desert on this voyage. Subsequently, at a hearing before another investigator of the INS, petitioner again identified himself but refused to make any further statement and refused to sign the statement in affidavit form wherein he identified himself.

Petitioner, by way of application for a writ and motion to suppress, seeks a deportation hearing pursuant to section 242(a) of the Immigration and Nationality Act, 8 U. S. C. A. § 1252(a), administrative bail pending the

outcome of such hearing, and the suppression of "certain documents and papers", so denominated by petitioner, which were allegedly the subject of an illegal search and seizure in violation of his constitutional rights.

The application proceeds upon a mistaken notion, and wholly overlooks the fact that in this instance the petitioner is being proceeded against under Article 24 of the Treaty of Friendship and General Relations between this country and Spain, 33 Stat. 2117, rather than under the immigration and nationality laws of this country. That article provides in pertinent part, that:

> The Consuls-General, Consuls, Vice-Consuls and Consular-Agents of the two countries may respectively cause to be arrested and sent on board or cause to be returned to their own country, such officers, seamen or other persons forming part of the crew of ships of war or merchant vessels [1] of their Nation, who may have deserted in one of the ports of the other.

Petitioner's rights being thus governed by a treaty between this government and his own, section 242(a) of the Immigration and Nationality Act, 8 U. S. C. A. § 1252 (a) is not applicable to him. See dicta in Medina v. Hartman, 9 Cir., 1958, 260 F. 2d 569 to such effect, although there the treaty was held inapplicable since desertion was not in a port of this country.

Having been afforded an opportunity to be heard on the only issues under Article 24, supra, which have bearing on his status, to wit, identity and the fact of desertion, petitioner has been accorded due process of law. Petitioner's admissions relating to his identity and his presence in this country, along with his stated pre-existing intent,

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[1] The applicability of this article to merchant seamen was terminated on notice by the United States. It otherwise remains in full force and effect. See *Treatise in Force*, Jan. 1, 1960, p. 158 fn.

are admissible against him, United States ex rel. Sun v. Karnuth, 2 Cir., 1932, 60 F. 2d 930; United States v. Hee, 2 Cir., 1932, 60 F. 2d 924, and his silence at the hearing and refusal to sign the statement there made may be the basis of a strong inference in favor of a finding of identity and desertion, the relevant facts. See Vajtauer v. Commissioner, 273 U. S. 102 (1927); Bilokumsky v. Tod, 263 U. S. 149 (1923).

Petitioner's marriage to an American citizen on the eve of his apprehension avails him naught. While section 245 of the Immigration and Nationality Act, 8 U. S. C. A. § 1255, permits an adjustment of status to permanent residence by a non-immigrant the provisions of said section are not applicable in the premises since petitioner was not lawfully admitted as a non-immigrant, but rather remained here upon a predetermined intention to desert after temporary admission. United States ex rel. Feretic v. Shaughnessy, 2 Cir., 1955, 221 F. 2d 262, cert. denied, 350 U. S. 822.

In view of the foregoing and since the evidence was not employed in any past proceedings and no future proceedings can be contemplated in which such evidence could be used petitioner's motion to suppress alleged illegally seized evidence is without merit. The application for administrative bail is similarly without merit, since, as the record indicates, respondent was acting with all dispatch to turn petitioner over to the appropriate Spanish authorities, pursuant to Article 24 of the Treaty, supra.

Application for the writ and motion to suppress are denied. So ordered.

Dated: October 4, 1960.

ALEXANDER BICK,
United States District Judge.

(Judgment entered Oct. 4, 1960.)

HERBERT A. CHARLSON,
Clerk.